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No. 499.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1937.

UNITED STATES OF AMERICA,

Petitioner,

v.

ROBERT K. WURTS.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

The respondent denies that petitioner is entitled to a Writ of Certiorari.

COUNTER-STATEMENT OF QUESTION PRESENTED

Under a statutory provision creating a right of action in the United States to bring suit to recover a refund of taxes "but only if such suit is begun before the expiration of two years after the making of such refund," is the

above quoted condition complied with when suit is started more than two years after the date on which the Commissioner of Internal Revenue approves the schedule of overassessments[1] although less than two years after the date of delivery of the refund check.

REASONS FOR DISALLOWANCE OF THE WRIT

The decision of the Circuit Court of Appeals is not in conflict with the decision of any other Circuit Court of Appeals, and is harmonious with prior decisions of the United States Supreme Court. The question presented is not of sufficient importance to warrant a writ of certiorari.

ARGUMENT

1. The decision of the Circuit Court of Appeals is not in conflict with the decision of any other Circuit Court of Appeals.

The United States, in its argument and brief in the District Court relied wholly on the case of *Paulson v. U. S.*, 78 Fed. (2nd) 97 (C. C. A. 10th) (1935), and in its brief and

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[1] The "*Question Presented*" as found on page 2 of the petition erroneously refers to the "schedule of refunds and credits." Under the practice prevailing throughout this case, the last act of the Commissioner consisted of the signing of the schedule of overassessment. Previously, it was the practice for the Commissioner to first sign the schedule of overassessments, and subsequently after Collectors had made appropriate adjustments to the taxpayer's account, to sign the schedule of refunds and credits. There is no schedule of refunds and credits involved in the present case. A full explanation of the previous and present practice is found in the Senate Finance Committee Report in reference to Section 1104 of the Revenue Act of 1932 (*infra*, p. 16).

argument before the Circuit Court of Appeals relied heavily on this case. The District Court, in its opinion sur rule for judgment, held that the Paulson decision is inapplicable, stating (R. 25), "As the Paulson case was determined under the provisions of the prior acts, and the instant case is to be determined under the latter amendment, it follows that the Paulson ruling does not apply." Similarly, in its decision the Circuit Court of Appeals held that (R. 36) "The case of Paulson v. United States, 78 Fed. (2nd) 97, involved refunds which did not come within the period prescribed in the Revenue Act of 1932 and is therefore inapplicable."

In the Paulson case the schedules of overassessment were signed before May 28, 1928, and consequently were not affected by Section 1104 of the Revenue Act of 1932 which provides that the date when the Commissioner "first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax" (U. S. C. Title 26, Sec. 1670). In the present case, the schedule was signed on March 15, 1932. It seems clear, therefore, that the decision in this case is not in conflict with the Paulson decision. It seems equally clear that no confusion is likely to arise because both lower courts in the present case expressly distinguish the Paulson case on its facts, and for the reasons stated.

2. The decision of the Circuit Court of Appeals is in harmony with prior decisions of the United States Supreme Court.

The argument of the United States is based upon the erroneous assumption that Section 610 (b) of the Revenue Act of 1928 is a statute of limitation, from which it is as-

sumed that the period of limitation would not start to run until the cause of action arises—*i. e.* the date of the delivery of the refund check, just as if the two year period under consideration were to be found in a general statute of limitations entirely apart from the very section in question only under which the present action could be brought. That the statutory remedy is exclusive was held in *Hartford Connecticut Trust Co. v. Eaton*, 8 Fed. Supp. 218 (1934), in the following terms, at page 220:

> "* * * The refund (involved in this case) * * * would have been an erroneous refund, for which the Commissioner had only one redress fixed by statute. He should have brought suit within two years after the refund for the amount alleged to have been erroneously refunded. Sec. 610, Revenue Act of 1928 (26 U. S. C. A., Sec. 2610)."

Section 610 (b) is not a statute of limitations. It imposes a condition on the cause of action. It was so held by the District Court in the present case in its opinion sur statutory demurrer (R. 17) and in its opinion sur rule for judgment (R. 22) and by the Circuit Court of Appeals in its opinion wherein it states (R. 36), "The United States is given statutory leave to recover refunds, but only upon the condition that the action be brought within two years from the date of the signing of the schedule of overassessment." Since Section 610 (b) imposes a condition there is no occasion or reason to inquire when the cause of action may have arisen, and it is neither surprising nor illogical that the period might start either before or after the cause of action arises or while the fund which is in dispute is still in the Treasury. On the contrary, it is entirely logical that the period starts when the schedule of overassessment is signed by the Commissioner, this being the last administra-

tive act of the only official who has the power to dispose of such cases on their merit. The drawing of the check is ministerial. Since we are dealing with a condition, it becomes immaterial whether the Commissioner may or may not later "head off" or recall the check drawn in payment.

The contention of the United States in the present case is similar in principle to contentions previously denied by the United States Supreme Court, whereas the decision of the Circuit Court of Appeals is wholly in harmony with these prior decisions which, it is believed, deal with cognate matters or subjects.

In *Girard Trust Co. v. United States,* 270 U. S. 163, (1925), the question arose as to the interpretation of the Revenue Act of 1921 which provided that, upon the allowance of a claim for refund, interest shall be allowed and paid "to the date of such allowance." The Supreme Court held that the date in question was not the date of actual repayment, nor the date on which the Commissioner first decides that there has been an overassessment and thereupon refers the matter to the Collector for examination and report, *but the date on which the Commissioner approves the amount thus ascertained for payment.*[2]

The Court further points our (page 169):

> "If Congress had intended that interest should be allowed to the date of payment, it seems to us it would have said so."

Similarly, if Congress had intended that the period provided in Section 610 (b) of the Revenue Act of 1928 should begin on the date of payment, it seems that it would have

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2 Under the practice prevailing throughout the present case, this would correspond to the date when the Commissioner signs the schedule of overassessments. To avoid confusion, it should be noted that the *Girard* case arose prior to the change in procedure discussed and explained in the Senate Finance Committee Report regarding Section 1104 (*infra*, p. 16).

said so. That the word "making" is not used in the sense of payment becomes even more obvious when consideration is given to the amendment to this very Section by Section 803 of the Revenue Act of 1936. This amendment reads as follows:

> "Section 803. Interest on Erroneous Refunds.
> (a) Section 610 of the Revenue Act of 1928, as amended, is amended by adding at the end thereof a new section to read as follows:
>
> '(d) Erroneous refunds recoverable by suit under this section shall bear interest at the rate of 6 per centum from *the date of the payment of the refund.*'" (Italics ours)

According to established principles of statutory construction, this change in phraseology in the same section from the word "making" to the word "payment" clearly imports a difference in meaning.

In *United States v. Swift & Co.*, 282 U. S. 468 (1930), the original plaintiff, Swift & Co., filed a claim for refund of a sum which had not been paid in cash but which consisted of a credit of an amount previously overpaid. Under the applicable statutes (Section 252 of the Revenue Act of 1921, 42 Stat. 268, and Section 284 (b) (1) of the Revenue Act of 1926, 44 Stat. 66, 26 U. S. C. A. 1065), as set forth in the report of the case, the plaintiff was required to file his claim within four years from the date of the allowance of the credit, and the court was required to determine at what date a credit is allowed for the purpose of determining whether the condition, as to when the claim must be filed, had been complied with. Particular attention is directed to the fact that both statutes involved in this case contain the expression, "no such credit or refund

shall be *allowed or made*'' after certain designated dates. The court picked that date as of which the Commissioner approved the schedule of refunds and credits for the reason that the court considered that to be the last administrative act in reference to perfecting the claim for refund.[3]

In arriving at this conclusion, the court in the *Swift* case quotes with approval from *Girard Trust Co. v. U. S.*, 270 U. S. 163, at page 170, as follows:

> ''The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overassessment has been made and that a refund or credit should be granted, and when he has made that decision finally, he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section.''

The Government, in the *Swift* case, sought to differentiate the *Girard* case on the ground that there the date of the allowance of a refund was in question; whereas, the Swift case involved the allowance of a credit. In denying that any such distinction exists the court states:

> ''This construction'' (*i. e.*, the court's) ''of the act brings about uniformity in administration, as it makes the allowance of credits and refunds simultaneous.''

Since the above statement was made regarding sections of the statute which specifically refer to credits or refunds as being ''allowed or made,'' it constitutes a holding by the Supreme Court that in point of time there is no distinction under the statutes between the allowance or mak-

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[3] As in the *Girard* case, this would again correspond to the date when the Commissioner signed the schedule of overassessments since the *Swift* case also arose prior to the change in procedure, but is no less in point on that account. See Footnote 2.

ing of credits or refunds; that both result from the same administrative act.

The contention of the United States in the present case involves precisely the same sort of inconsistency condemned by the Supreme Court in the *Swift* case, *supra*. This would result under numerous closely related and interdependent sections of the Revenue Acts. For instance, Section 322 (b) of the Revenue Act of 1934 provides that unless a claim for credit or refund is filed within three years after the return was filed or within two years after the tax was paid no credit or refund shall be "allowed or made" after the expiration of whichever of such periods expires the later. Whether an overpayment results eventually in a credit or a refund depends entirely upon the purely fortuitous circumstance of the status of the taxpayer's account at the time the overpayment is determined, and this is neither known nor determined by the Treasury Department until after the fact of overpayment has been determined by the Commissioner on the merits. Still, the United States argues, substantially as it did in the *Swift* case, that a distinction exists in point of time between credits and refunds.

This contention would, if sustained, inject similar uncertainties and conflict respecting other related Sections of the Revenue Acts in addition to Section 322 (b). For further illustration, Section 322 (b) of the Revenue Act of 1934 (with immaterial exceptions the same in Revenue Acts of 1928 and 1930), also provides in part:

> "(1) * * * No credit or refund shall be *allowed* or *made* after two years from the time the tax was paid * * *
>
> "(2) The amount of the credit or refund shall not exceed the portion of the tax paid * * * during the

three (two years, prior to 1934) years immediately preceding the *allowance* of the credit or refund."

Section 322 (d) provides, in part:

"(d) * * * No such credit or refund shall be *made* of any portion of the tax unless * * *, &c." (Italics ours.)

From the foregoing it seems that, generally speaking, credits are "allowed" and refunds are "made." In the single section just quoted, credits are referred to as being "allowed" and refunds as "made"; both credits and refunds are then referred to as "allowed"; and finally, both are referred to as being "made." The conclusion is irresistible that the words are used interchangeably and entirely without any distinction in meaning.

Again, if the distinction urged by the United States between the time when a refund is "allowed" and the time when it is "made" is sustained, it would defeat the very purpose of the enactment of Section 1104, so far as refunds are concerned, as clearly explained by the Senate Finance Committee Report in reference to that Section (*infra*, p. 16).

This is clear when Section 1104 is read in conjunction with Section 322 (b) (1) of the Revenue Act of 1932. The latter section relates to refunds and credits and provides:

"Section 322. Refunds and Credits.

(b) Limitation on Allowance.

(1) Period of Limitation.—No such credit or refund shall be *allowed or made* after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer." (These provisions were changed by

amendment in 1934, but the changes in no way affect the point under discussion.) (Italics ours.)

Section 1104 (*infra*, p. 15) fixes the "date of *allowance* of refund or credit" as the date when the Commissioner first signs the schedule.

The Senate Finance Committee explains (*infra*, p. 16) that the purpose of enacting Section 1104 was not only to clarify the date in question in view of the change in the administrative procedure, but also to protect taxpayers who might not be aware of their right to a refund in time to file their claim within two years after the tax was paid. Under Section 322 (b) (1), just quoted, either the taxpayer must file his claim within two years after the tax is paid or the Commissioner must *make* the refund within that period. If the purpose of Section 1104 is to permit the Commissioner to accomplish a refund at the earlier date by signing the schedule (and the Senate Finance Committee Report declares this to be the purpose) and thus favor small taxpayers who might not be aware of their rights, then it must follow that a refund is "made" when it is "allowed." A contrary construction would nullify the purpose of Section 1104 by postponing the "making" of the refund until the later date when payment occurs, and the effect of Section 1104 as desired and intended by Congress would thus be lost, because it might then be too late legally to *make* the refund. Such a contrary construction should be avoided, as a statute should be construed in a sense that will effect the legislative purpose, *U. S. v. Katz*, 46 S. Ct. 513, 271, U. S. 354. Committee Reports in explanation of the purpose and design of specific provisions of the Revenue Acts are considered as deserving of peculiar authority in the construction of such provisions; *Hecht v. Malley*, 44 S. Ct. 462, 265 U. S. 144; and reference

is frequently made to them, *Burnet v. S. & L. Building Corp.*, 53 S. Ct. 428, 288 U. S. 406.

The foregoing will serve to illustrate some of the several provisions of the Revenue Act using the words "allowed" and "made," and all of which relate to some aspect of credits or refunds. In the illustrations given, to which others could be added, the meaning of the word "made" as contended for by respondent seems beyond doubt. Respondent understands that the United States does not deny this, but insists that its meaning is different in the single Section 610 (b) of the Revenue Act of 1928. Such a position is untenable. In construing one section of the Revenue Act containing certain words or phrases, the court may and should resort to other provisions containing the same words or phrases. "In the absence of anything in the statute clearly indicating a contrary intent, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout, and where its meaning in one instance is clear, this meaning will be attached to it elsewhere." 59 *C. J.* 1003, citing *Pampanya Sugar Mills v. Trinidad*, 49 S. Ct. 308, 279 U. S. 211, 73 L. Ed. 665 (1929), and *Llewellyn v. Harbison*, 31 F. (2nd) 740, cert. den. 50 S. Ct. 18, 280 U. S. 560 (1929). As something in the statute indicating a contrary intent, the United States claims that Section 1104 of the Revenue Act of 1932 and Section 610 of the Revenue Act of 1928 are not in *pari materia*, and that the former in no way modifies the latter, and on page 5 of its petition quotes the Report of the House Committee on Ways and Means in explanation of Section 614 of the Revenue Act of 1928 which amended Section 1116 (b) (2) of the Revenue Act of 1926 which, until the 1928 amendment, contained a definition of "date of allowance of refund" similar to that now contained in Section 1104.

It should be observed first that the definition of "date of allowance of refund" in Section 1116 (b) of the Revenue Act of 1926 was expressly limited in its application to that Section of which it was a part and which dealt with interest. As pointed out in the footnote on page 6 of the petition, this definition dropped out of the Act of 1928. But by way of contrast, Section 1104 of the Revenue Act of 1932 is a complete Section in itself, and is not limited to any particular aspect of credits and refunds such as interest.

It should be observed next that from this same House Committee Report the conclusion is drawn by the United States that the Report evinces the understanding of Congress that the "making of the refund" takes place when payment is actually made subsequent to the signing of the schedule. Assuming that this report is relevant to the question of statutory construction now before the court, respondent submits that the Report in question leads to a conclusion quite contrary to that contended for by the United States. It will be noted that the part of the Report quoted by the United States has to do with the question of interest upon a refund and points out that prior to the amendment discussed in the Report, the allowance of the refund may be on a date which often precedes "the *actual* making of the refund by a considerable period of time and thus deprives the taxpayer of interest during that period." The use of the word "actual" immediately before the words "making of the refund" indicates clearly that the Report has in mind a distinction between the "making of the refund" in the statutory sense and the "actual making of the refund" in the sense of the actual payment of the refund. If the refund is "made" in the statutory sense when the check is delivered to the taxpayer, logically the interest should run to the date of delivery of the check because the refund would not be

"made" in the statutory sense until the delivery of the check. Per contra, the amendment under discussion in the Report limited the interest period to a date not more than thirty days preceding the date of the refund check, such date to be determined by the Commissioner. Obviously, the "making" of the refund was determined by the Commissioner at the same time, so that until the refund was made in the statutory sense the amount of interest and the period for which it should run could not be determined by the Commissioner.

Finally, if the Circuit Court of Appeals in the present case entertained any doubt on the point in issue, it correctly resolved such doubt against the United States and in favor of the respondent.

United States v. Updike, 281 U. S. 489 (1930), involves an interpretation of Section 278 (d) of the Revenue Act of 1926 relating to the limitations on the bringing of suits by the Government after assessment. In holding that the suit in question was barred the court states, at p. 496:

> "* * * We think this is the fair interpretation of the clause, and one which must be accepted, especially in view of the rule which requires taxing acts, *including provisions of limitations embodied therein*, to be construed liberally in favor of the taxpayer. *Bowers v. New York & Albany Co.*, 273 U. S. 346, 350." (Italics ours.)

And in *United States v. Steel Furniture Co.*, 74 Fed. 744 (C. C. A. 6th Cir.) (1935), referring specifically to Section 610 of the Revenue Act of 1928, the court states:

> "The statute was evidently enacted to grant taxpayers repose from suits for erroneous refunds made by the Government. Being a part of a taxing act, it

is to be given a liberal construction in favor of the taxpayer. W. P. Brown & Sons Lumber Co. v. Commissioner, 38 F. (2nd) 425, 428, so far as it is to be construed as holding differently, must be deemed to have been overruled by Bowers v. New York & Albany Co., 273 U. S. 346, 350, and United States v. Updike, 281 U. S. 489, 496."

3. The question presented is not of sufficient importance to warrant a writ of certiorari.

If the petition for writ of certiorari is denied, the United States may correct the situation in all future cases by the simple expedient of starting such actions to recover erroneous refunds within the time required by law. It would not even be necessary to incur the inconvenience of having the statute amended.

Respondent submits, therefore, that the writ of certiorari prayed for should be denied.

Respectfully submitted;

RUSSELL DUANE,
DUANE, MORRIS & HECKSCHER,
Attorneys for Respondent.

SANFORD D. BEECHER,
ARCHIBALD T. JOHNSON,
Of Counsel.

APPENDIX.

Revenue Act of 1928, c. 852, 45 Stat. 791:

"SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

* * * * * * * * *

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later. (U. S. C., Title 26, Sec. 1646.)"

Revenue Act of 1932, c. 209, 47 Stat. 169:

"SEC. 1104. DATE OF ALLOWANCE OF REFUND OR CREDIT.

Where the Commissioner has (before or after the enactment of this Act) signed a schedule of overassessments in respect of any internal revenue tax imposed by this Act or any prior revenue Act, the date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax. (U. S. C., Title 26, Sec. 1670.)"

Extract from Report of Senate Finance Committee having reference to Section 1116 of the Revenue Act of 1926 (S. Rep. No. 52, 69th Cong., 1st Sess., p. 38):

"In the case of refunds, interest is allowed 'to the date of the allowance of the refund.' In practice the commissioner first signs a schedule of over-assessments, which is sent to the collector, in order to determine whether the overpayment should be credited or refunded. The committee amendment proposes to fix as the date on which a refund is allowed the date on which the commissioner signs the schedule of over-assessments."

Extract from Report of Senate Finance Committee having reference to Section 1104 of the Revenue Act of 1932 (S. Rep. No. 665, 72nd Cong., 1st Sess., pp. 57-58):

"Under the practice once prevailing in the Bureau of Internal Revenue the commissioner first signed a schedule of overassessments, which fixed the amount of the taxpayer's overassessment, and later, after the collector had made appropriate adjustments to the taxpayer's account in accordance with this schedule, signed a schedule of refunds and credits, which formally approved the action so taken and directed the making of any money payments due the taxpayer. In recent years the schedule of refunds and credits has been abandoned; the commissioner's final action consists in signing the schedule of overassessments, which in itself contains complete directions as to the further steps to be taken toward abating, crediting, or refunding the overassessments entered on the schedule. Some question has arisen as to whether certain court decisions, rendered upon the basis of the previous practice and holding that the allowance of the refund or credit takes place upon the signing of the second schedule, are applicable under the new

practice. The provisions of this section, added by your committee, establish a rule which accords with the practice of the Treasury and permits the allowance of refunds and credits with the minimum of difficulty to the Government and the taxpayers as well. It protects the interests of small taxpayers particularly, who may not learn of any refund or credit which may properly be due them in sufficient time to file a claim and may lose the benefit thereof unless the commissioner by signing the schedule of overassessments can make the allowance within the statutory period. In order to settle any question as to the commissioner's allowance of a number of small refunds and credits in cases recently arising, your committee has made the provisions of this section retroactive to the date of the enactment of the 1928 Act."

Extract from Report of House Committee on Conference (H. Rep. No. 1492, 72d Cong., 1st Sess., pp. 28-29):

"Amendment No. 259: This amendment makes it clear that credits or refunds are to be considered as allowed on the date on which the commissioner first signed the schedule of overassessments, provided the schedule was signed after May 29, 1928; and the House recedes."